BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PETER JOSEPH FOY Claimant	)	
V.	)	
KANSAS COACHWORKS LTD Respondent	)	Docket No. 1,051,265
AND	)	
REPUBLIC INDEMNITY CO. OF AMERICA Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge Steven J. Howard's October 15, 2013 Award. The Board heard oral argument on April 8, 2014.

APPEARANCES

Michael P. Bandrè of Overland Park, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Respondent acknowledged at oral argument that claimant provided timely notice.

ISSUES

The claimant alleged repetitive injuries to his low back and right hip through his last date of work, April 5, 2010.[1] Judge Howard concluded claimant did not sustain accidental injury arising out of and in the course of his employment. Claimant appealed, arguing he proved a compensable work injury. Respondent requests the Award be affirmed.

The issue for the Board's review is: Did claimant sustain an accidental injury arising out of and in the course of his employment?

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[1] Claimant asserts the legal date of accident, using K.S.A. 2009 Supp. 44-508(d), should be the date written claim was made, which would have been within 10 days of his last day worked. Regardless of what day in April 2010 claimant's legal or fictitious date of accident occurred, such result does not impact the Board's conclusions.

FINDINGS OF FACT

Claimant started working for respondent in August 2007 as a collision technician. His job consisted of metal and body work, including repair of wrecked vehicles, frame alignments and replacing panels. Claimant was required to lift and kneel on a daily basis to remove or install doors, bumpers, rear lift gates and hatches.

Claimant had a prior and unrelated work-related hand injury with respondent when he suffered a laceration and was sent by respondent to the hospital. He testified respondent paid his medical bills amounting to approximately $2,000.

Claimant's symptoms started with a stabbing pain in his lower back. Subsequently, he began having pain in his right hip and right thigh, as well as a stinging sensation in his left buttock. Claimant testified the pain started approximately a year and a half before he finally sought medical treatment. He testified his pain would wax and wane.

Catherine Smith, respondent's president, testified she noticed a change in claimant's demeanor and he made several work mistakes, including setting a car on fire. She also was informed by a couple of claimant's coworkers that he was smoking marijuana in respondent's parking lot on his lunch hour. On April 5, 2010, she met with claimant in the morning and asked him to take a drug test. Later that afternoon, around 3:00 p.m., claimant went to OHS Compcare to take the test. The initial urinary analysis sample was insufficient. Claimant was asked to stay until he could provide an additional sample, but he became angry and left. Claimant admitted that had he completed the test, it would have been positive for marijuana.

Ms. Smith contacted claimant later that day. Claimant told her that he quit his job. Claimant testified that he essentially quit due to the lack of being assigned any work for the three weeks prior to his leaving. Ms. Smith testified it was not her intention to terminate claimant's employment had he tested positive for drugs, but instead would have provided rehabilitation as she had for other employees. Within 10 days of his resignation, claimant faxed respondent a notice of injury and request for medical treatment. No medical treatment was provided. Ms. Smith believed claimant's allegations were fraudulent.

Claimant sought treatment with Denny Mariyam Thomas, M.D., his family physician. Dr. Thomas is board certified in family medicine. Claimant first saw Dr. Thomas on April 26, 2010, and he complained of lower back pain which radiated into the right leg for the past two years. Dr. Thomas noted claimant "[u]sed to work at Kansas Coachworks. He quit one month ago, which he states was not at all back related."[2] The April 26, 2010 report contains no mention of a work-related injury. Dr. Thomas recommended an MRI, which was conducted on April 28, 2010, and revealed a moderate posterior disk bulge at L4-5 and mild broad-based bulge at L3-4. At a follow-up visit with Dr. Thomas on May 10, 2010, claimant indicated his back pain was work-related.

[2] P.H. Trans., Resp. Ex. A at 7.

On May 12, 2010, claimant filed for unemployment benefits. On the multiple-page application, claimant never mentioned a back injury or back pain. Claimant specifically stated on the application, apparently in the context of respondent's request for a drug sample, that "[he] had not hurt [himself] at work or been involved in an accident."[3]

Clamant was seen at his attorney's request by Edward Prostic, M.D., a board certified orthopedic surgeon, on May 25, 2010. Dr. Prostic opined that during the course of claimant's employment with respondent, he suffered repetitive trauma to his low back which aggravated the degenerative disk at L4-5. Dr. Prostic provided restrictions of light/medium-level employment with avoidance of frequent bending or twisting at the waist, forceful pushing or pulling, or more than minimal use of vibrating equipment.

At a September 14, 2010 preliminary hearing, claimant testified before Judge Howard. Claimant testified he did not provide notice of a work-related injury until after his resignation, but believed everyone at work knew he had back pain because of how he walked and his reluctance to assist with lifting heavy objects. Several other individuals testified before Judge Howard regarding their knowledge of claimant's back problems as follows:

- Ms. Smith testified claimant made no complaints of back pain and never told her that he was unable to do certain job duties because of back pain;

- David Irvin, respondent's shop foreman and claimant's supervisor, testified he could not recall any occasion when claimant had discussed back pain or indicated he could not perform job duties because of back pain; and

- Beverly Denk, respondent's vice president, testified she could not recall that she was ever made aware claimant had complaints of back pain or that he could not perform certain job duties because of back pain.

Ms. Smith also testified she was present at claimant's unemployment hearing and when claimant was asked if he had ever sustained a work-related injury, he denied ever getting hurt on the job.

In a preliminary hearing Order dated September 17, 2010, Judge Howard concluded:

> 1. Claimant's history regarding an alleged occupational accident is questionable based the initial consultation notes with Dr. Thomas who's [sic] records indicate an non-occupational back problem. This entry was modified at the claimant's second consultation to show it as an occupational injury.

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[3] *Id.*, Resp. Ex. A at 19.

2. The testimony of three creditable witnesses contradict claimants testimony. The three witnesses testified that they were unaware of claimant's alleged back difficulties. Further, claimant did not discuss his back condition with any of the witnesses. Further, claimant's work duties were not modified due to an alleged back difficulty during his employment with the respondent.

3. Claimant's employment was terminated due to his failing to provide and comply with an adequate sample at an [sic] UA test. After being terminated claimant filed the present workers' compensation claim.

4. For the reasons cited above, the Administrative Law Judge is not persuaded as being more probably true then not true that claimant sustained an occupational accident injuring his low back, which arose out of and in the course of his employment with respondent.

Claimant appealed the preliminary hearing Order to the Board. On November 23, 2010, a former Board Member agreed with Judge Howard that claimant was not entitled to medical treatment because claimant had failed to meet his burden of proof that he suffered a work-related accidental injury.

After benefits were denied, claimant presented additional evidence. On April 7, 2011, John Foy, claimant's brother (hereinafter Mr. Foy), testified. Mr. Foy worked with claimant. He testified he was aware claimant had back pain because claimant frequently laid down and complained about his back whenever he asked claimant for help. Mr. Foy indicated a coworker brought an inversion table to work and, while he never saw claimant hanging on it, he knew claimant frequently visited the area where the inversion table was located. Mr. Foy believed Mr. Irvin knew about claimant's back problems because it was common knowledge around the shop. Mr. Foy acknowledged claimant never told him the job was causing his back problems. He was not claimant's supervisor.

Mr. Foy testified regarding a workers compensation injury he sustained while working for respondent, including that he earned between $70,000 to $75,000 in the year he worked for Kansas Coachworks after his accident, and all his medical expenses related to that injury were paid by the respondent. Mr. Foy further noted Ms. Smith gave him $500 cash to cover his living expenses when he did not earn wages during the time before the temporary total benefits began.

Mark Giampetruzzi worked for respondent until December 2009. He was an estimator, not claimant's supervisor. He testified on April 7, 2011. He testified claimant complained quite regularly about back pain and he believed claimant's back problems were common knowledge around the shop. Mr. Giampetruzzi knew claimant used the inversion table, but never saw claimant using the table. He did not recall claimant ever saying his back problems were caused by his work. He mentioned claimant's back problems to Mr. Irvin. Mr. Giampetruzzi testified he had no knowledge of any retaliatory acts by Ms. Smith.

Patrick Murray worked for respondent as the parts manager. He was not claimant's supervisor. Mr. Murray testified on May 25, 2011. Mr. Murray testified claimant complained of back discomfort and migraine headaches. He brought in an inversion table for coworkers to use. The inversion table may have been brought in by Mr. Murray to assist claimant in relieving him of cluster headaches. Mr. Murray testified claimant told him the inversion table caused his headaches to feel better. He testified he never heard claimant give notice of a work-related injury to anyone at respondent.

On December 21, 2011, claimant was seen at respondent's request by Chris Fevurly, M.D., who is board certified in preventative medicine and internal medicine, and certified as an independent medical examiner. Claimant complained of constant low back ache and numbness along the right thigh. Claimant reported his right hip was much better and his left leg symptoms had resolved. Claimant had near full range of motion in the lumbar spine. Dr. Fevurly diagnosed claimant with mechanical low back pain and degenerative disc disease. Dr. Fevurly opined claimant's degenerative disc disease was not the result of cumulative trauma, but the natural consequence of living and aging. Dr. Fevurly stated, "current scientific evidence does not support the premise that 'cumulative trauma' results in or aggravates degenerative disc disease."[4]

Dr. Fevurly indicated claimant's work caused no harm or impairment to his spine. Dr. Fevurly believed claimant did not need permanent restrictions or future medical treatment. Dr. Fevurly reviewed a task list prepared by Michelle Sprecker[5] and opined claimant had no task loss.

On October 30, 2012, claimant was seen by Terrence Pratt, M.D., for a court-ordered independent medical examination. Claimant complained of a continuous dull aching in the center of his low back with some numbness in the right thigh and tingling in the left buttock. On examination, Dr. Pratt reported claimant's Waddell's assessment revealed inappropriate responses to distraction, regional disturbances, and overreaction or three out of five potentially inappropriate responses. Having three or more positive responses to Waddell's testing is considered significant. Dr. Pratt diagnosed claimant with low back pain with degenerative disc disease and moderate spinal stenosis, history of marijuana use and inappropriate responses on examination. Dr. Pratt was instructed by the judge not to address causation. Using the AMA *Guides*[6] (hereinafter *Guides*), Dr. Pratt assigned a 10% permanent partial impairment to the body as a whole with 7% preexisting. Dr. Pratt opined claimant was not in need of any restrictions.

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[4] Fevurly Depo., Ex. 2 at 11.

[5] Ms. Sprecker, a vocational rehabilitation counselor, interviewed claimant on May 8, 2012. She testified there was a discrepancy between tasks claimant described and what she observed on-site.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Dr. Prostic testified on March 4, 2013. Dr. Prostic testified claimant's repetitive work aggravated the degenerative disk disease at L4-L5. He acknowledged not having spoken to claimant since May 2010. Dr. Prostic did not know claimant's current status, but believed claimant would be at maximum medical improvement, even without treatment, because his symptoms were permanent. Dr. Prostic assigned a 10% functional impairment to the body as a whole pursuant to the *Guides*. Dr. Prostic assigned medium level restrictions. Out of the 7 tasks provided by Dick Santner,[7] it was Dr. Prostic's opinion that claimant was unable to perform 4 of them for a 57% task loss.[8]

Dr. Prostic testified if the information contained in Mr. Santner's report was inaccurate and claimant had additional jobs or tasks, such information would change his opinion regarding what task loss claimant may have suffered.

Mike Strickling, the manager of Sweet Dreams where claimant worked off and on since 2007 or 2008, testified on May 25, 2013. He testified claimant's job involved washing and polishing cars, which required lifting, reaching overhead, bending, stooping and twisting. He was aware of claimant's back problems and testified claimant advised them he could not do any heavy lifting.

Claimant testified at the regular hearing before Judge Howard on July 9, 2013. He testified he experiences stiffness in his lower back which radiates down his left buttock.

Dr. Thomas testified on August 30, 2013. Dr. Thomas testified she first saw claimant in April 2010 and claimant made no indication at that time his low back pain was due to a work-related accident. Claimant first mentioned the possibility of a work-related injury at his May 10, 2010 visit. Dr. Thomas acknowledged never asking claimant what caused his back pain. She provided no opinion whether claimant injured himself at work.

Judge Howard issued the Award on October 15, 2013, as follows:

> The Administrative Law Judge after careful review of the entire record herein finds claimant has failed to established as more probably true then not true that he sustained an accidental injury which arose out of and in the course of his employment with respondent as alleged. Specifically, the Administrative Law Judge finds testimony of Dr. Pratt that claimant had a prior 7% impairment, prior to April 2010, and a 10% impairment in October 2012 does not surmise that claimant's condition was related to any alleged occupational accident. In fact, Dr. Pratt was specifically prohibited from giving a causative determination regarding claimant's permanent functional impairment.

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[7] Claimant was interviewed by Dick Santner, a vocational rehabilitation counselor, on September 15, 2011.

[8] Prostic Depo., Ex. 3.

> Additionally, the Administrative Law Judge has carefully reviewed the testimony of claimant regarding his allegation that various supervisors knew of his continued complaints of back pain and its relationship to his occupational duties. This simply is not true. Catherine M. Smith, David Irvin, and Beverly Denk, all supervisors testified unrefutely that they were unaware that claimant suffered a back injury arising out of and in the course of his employment with respondent until such time his claim was properly filed. In fact, claimant's own brother testified that claimant never advised him that he suffered a work related injury, the brother being aware of claimant's on-going complaints of back difficulties.
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> Additionally, the record indicates that Dr. Thomas' failed to demonstrate that claimant advised the physician at the time of the initial examination that this was a work related accident. Further, Dr. Thomas' bills were paid by claimant's health and accident provider. Additionally, the MRI that Dr. Thomas ordered was paid for by the health and accident provider which claimant had independent of the workers compensation coverage.
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> Furthermore, claimant indicated in his unemployment hearing, that he had not suffered an on-the-job injury while employed the respondent.
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> Even Patrick Murray, the parts manager, who testified regarding the inversion table, was unaware that claimant's work activities caused injury to his back. Mr. Murray testified that claimant indicated that he had back problems, but there was no indication that it was work related.
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> Lastly, claimant has admitted that he is daily marijuana user. Hence, claimant has admitted his involvement in illegal activities on a daily basis.
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> Based upon the foregoing, claimant has failed to established as more probably true then not that he sustained an occupational accident arising out of and in the course of his employment with the respondent. Claimant had suffered a long standing degenerative disk disease process, with his on-going age, he is a very poor historian, and is not credible, or believable on his version of events which gave rise to the allegation of a work related accident.

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[9] Claimant bears the burden of proving his or her right to an award based on the whole record under a "more probably true than not true" standard.[10]

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[9] K.S.A. 2009 Supp. 44-501(a).

[10] *Id.* and K.S.A. 2009 Supp. 44-508(g).

K.S.A. 2009 Supp. 44-508(d) states that an “accident” is:

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11] The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must exist before compensation is allowable and they have separate and distinct meanings:

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

K.S.A. 2009 Supp. 44-551(i)(1) provides in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2009 Supp. 44-555c(a) provides:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

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[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[12] *Id.*

From July 1, 1993 forward, the Board assumed the de novo review of the district court.[13] Like the district court, Board review of an administrative law judge's order is de novo on the record.[14] "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."[15] De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.[16]

ANALYSIS

Appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.[17] While the Board conducts de novo review, the Board nonetheless often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[18]

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[13] See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

[14] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[15] *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

[16] *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009); see *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[17] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[18] It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. ___ (2012); see also *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010), *rev. denied* 293 Kan. 1107 (2012). Cases such as *Camp v. Bourbon County*, No. 104,784, 281 P.3d 597 (Kansas Court of Appeals unpublished opinion filed July 27, 2012) *rev. denied* Sep. 4, 2013, and *Ellis v. City of Overland Park*, No. 109,206, 2013 WL 5507476 (Kansas Court of Appeals unpublished opinion filed Oct. 4, 2013), state the Board's explanation for disagreeing with a judge's first-hand credibility determination is one of five factors to consider on appellate review under K.S.A. 77-621(d). Other appellate cases state K.S.A. 77-621(d) requires the Court of Appeals to defer to a judge's first-hand factual findings regarding credibility over that of the Board. See *Flaitz v. CBOCS W., Inc.*, No. 109,910, 2014 WL 802478 (Kansas Court of Appeals unpublished opinion filed Feb. 28, 2014) ("Since Flaitz did not testify before the ALJ, the statutory deference to 'determinations of veracity by the presiding officer who personally observed the demeanor of the witness' does not apply here."); *Spivey v. Brewster Place*, No. 109,393, 2013 WL 5925984 (Kansas Court of Appeals unpublished opinion filed Nov. 1, 2013) ("It is important to note that because the medical experts in this case testified solely by deposition, the Board was in the same position as the ALJ to make credibility determinations. Therefore, we need not give deference to the ALJ's determination over that of the Board."); *Criswell v. U.S.D. 497*, No. 104,517, 263 P.3d 222 (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011) *rev. denied* Feb. 4, 2013 (same); *Bishop v. Russell Stover Candies*, No. 103,827, 2010 WL 5185815 (Kansas Court of Appeals unpublished opinion filed Dec. 17, 2010) (Court gave "no deference to the administrative law judge's determination over that of the Board" where both the judge and the Board only heard evidence submitted in writing or in out-of-court depositions, with no live testimony before the judge.).

The judge, after two first-hand opportunities to observe claimant's testimony and demeanor, concluded claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment. The judge made an explicit determination against claimant's veracity. The judge also had the opportunity to observe three witnesses who testified on respondent's behalf and he sided with respondent's concerns regarding compensability.

The judge plainly did not find claimant credible. While claimant contended various supervisors knew, while he worked for respondent, that he had back pain secondary to his occupational duties, Ms. Smith, Mr. Irvin and Ms. Denk all denied claimant's allegations. Claimant's own brother knew claimant had back complaints, but testified claimant never told him he suffered a work-related injury. Mr. Murray testified he was unaware claimant's work activities caused him to have a back injury.

The judge impliedly expected claimant to have told Dr. Thomas that his low back condition was due to his work activities at their initial evaluation on April 26, 2010 and claimant would process his associated medical bills, including for his MRI, through workers compensation insurance.

Further, the judge impliedly found it difficult to believe claimant had health insurance through respondent, and alleged back pain for one and one-half years to two years, before he resigned, but did not seek medical treatment until after he resigned.

The judge also noted claimant's admission that Mr. Santner's work history did not include the work he performed for Sweet Dreams in 2007 and 2008. It appears the judge viewed claimant's lack of providing an accurate task history as a strike against him.

The judge observed claimant, in his unemployment hearing, indicated he had not suffered an on-the-job injury while employed by the respondent. Claimant did indicate in a May 12, 2010 written statement for unemployment purposes that he had not been injured at work. While this raises concerns, the Board does not view claimant's statement as a recantation of his earlier statement to respondent that he had been injured at work due to repetitive duties. Rather, claimant's statement can just as easily be viewed in the context that he was arguing the drug test was pretextual and a drug test would only have been warranted in a situation in which an employer requires an employee to submit to drug testing after a work accident.[19] Insofar as claimant only alleged a work accident after his drug test, he appears to argue respondent was just fishing for a reason to test him. Also, if claimant had already alerted respondent, within 10 days of his last day worked (some time in mid-April 2010) that he had injured his back at work, it would be nonsensical for him to later allege at the unemployment hearing that he never had a work injury. Claimant's statement that he had not sustained a work injury, after he already gave notice of a work injury, is consistent with his complaint that respondent had no valid reason to drug test him, such as him having had a work accident.

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[19] See K.S.A. 2009 Supp. 44-501(d)(2) & (3).

A great deal of ill will existed between claimant and respondent.[20] Both the judge's preliminary hearing Order and his Award noted claimant only requested medical treatment and alleged a workers compensation claim after his termination. Such fact raises the concern that claimant only alleged a work injury as retaliation over how he perceived he was treated by respondent.

The judge noted claimant is a daily marijuana user and "admitted his involvement in illegal activities on a daily basis."[21] However, while we can speculate claimant's marijuana use may affect his memory, the illegal activity of regular marijuana use, standing alone, does not affect claimant's credibility. Even if we were dealing with a conviction for drug use (which we are not), drug crimes are not crimes of dishonesty or false statement.[22]

Claimant's drug use and his statement, for unemployment purposes that he was not injured, do not impact his credibility. Nevertheless, the Board, in conducting de novo review, nonetheless agrees with Judge Howard that claimant was not credible and failed to prove that he was injured at work as alleged. The judge set forth multiple other reasons why he did not believe claimant's allegations. The Board also affirms the judge's finding that claimant's back problem was due to longstanding degenerative disk disease process, that he is a "very poor historian, and is not credible, or believable on his version of events which gave rise to the allegation of a work related accident."[23]

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the October 15, 2013 Award. Claimant failed to prove personal injury by accident which arose out of and in the course of his employment.

AWARD

WHEREFORE, the Board affirms the October 15, 2013 Award.

IT IS SO ORDERED.

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[20] See P.H. Trans., Resp. Ex. A at 9-23.

[21] ALJ Award at 8.

[22] "Drug offenses per se do not involve dishonesty or false statement in their commission; hence K.S.A. 60-421 renders convictions for those offenses inadmissible for the purpose of impairing the credibility of a witness." *State v. Crowley*, 220 Kan. 532, 536, 552 P.2d 971, 975 (1976). See also *State v. Belote*, 213 Kan. 291, Syl. ¶ 4, 516 P.2d 159 (1973) ("For the purpose of discrediting a witness, evidence is not admissible to show that he is a user of drugs, or to show the effect of the use of such drugs, unless it is shown that the witness was under their influence at the time of the occurrences as to which he testifies, or at the time of the trial, or that his mind or memory or powers of observation were affected by the habit.").

[23] ALJ Award at 8.

Dated this _____ day of April 2014.

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BOARD MEMBER

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BOARD MEMBER

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Honorable Steven J. Howard